

Before the
Administrative Hearing Commission
State of Missouri



MULBERRY STREET ISL,)	
)	
Petitioner,)	
)	
vs.)	No. 12-2217 SP
)	
DEPARTMENT OF SOCIAL SERVICES,)	
MISSOURI MEDICAID AUDIT AND)	
COMPLIANCE UNIT,)	
)	
Respondent.)	

DECISION

We deny the application of Mulberry Street ISL (“Mulberry Street”) to renew its Title XIX Medicaid Provider Participation Agreement because it failed to allow the Missouri Department of Social Services (“DSS”), Missouri Medicaid Audit and Compliance Unit staff to conduct an on-site audit and failed to later provide proper documentation in response to DSS requests.

Procedure

On December 21, 2012, Mulberry Street filed its complaint appealing DSS’s decision denying its application to renew its Title XIX Medicaid Provider Participation Agreement (“agreement”). On January 25, 2013, DSS filed a motion for involuntary dismissal, alleging that

we lack subject matter jurisdiction over this case. On February 11, 2013, we denied DSS's motion. On February 21, 2013, DSS filed its answer.

On September 27, 2013, DSS filed a motion for summary decision. Regulation 1 CSR15-3.446(6)(A)¹ provides that we may decide this case without a hearing if DSS establishes facts that Mulberry Street does not dispute and entitle DSS to a favorable decision. Those facts may be established by stipulation, pleading of the adverse party, or other evidence admissible under the law.² We gave Mulberry Street until October 29, 2013 to file a response. Mulberry Street filed nothing. The certified business records and affidavits attached to DSS's motion are admissible evidence.³ Also, under Supreme Court Rule 59.01, Mulberry Street's failure to answer requests for admission establishes the matters asserted in the requests, and no further proof is required.⁴ Such deemed admissions can establish any fact or any application of law to fact.⁵ That rule applies to all parties, including those acting *pro se*.⁶ Section 536.073⁷ and 1 CSR 15-3.420(1) apply that rule to this case.

The following findings of fact are undisputed.

Findings of Fact

1. DSS is charged with administering Missouri's Title XIX Medicaid program.
2. Mulberry Street was a provider of Title XIX Medicaid services at all relevant times.

Diane Mack owned Mulberry Street at all relevant times.

¹ All references to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

² 1 CSR 15-3.446(6)(B).

³ Section 536.070(10). Statutory references, unless otherwise noted, are to RSMo Cum. Supp. 2013.

⁴ *Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819, 827 (Mo. App. W.D. 1985).

⁵ *Linde v. Kilbourne*, 543 S.W.2d 543, 545-46 (Mo. App. W.D. 1976).

⁶ *Research Hosp. v. Williams*, 651 S.W.2d 667, 669 (Mo. App. W.D. 1983).

⁷ RSMo 2000.

3. Between May 1, 2009, and May 23, 2012, Mulberry Street and DSS entered into a series of three annual Title XIX Medicaid Provider Participation Agreements. These agreements required Mulberry Street to adhere to all regulations enforced by the Missouri Department of Social Services, Division of Medical Services (“DMS”).

4. On March 30, 2012, Mulberry Street applied to DSS for a one-year renewal of its agreement.

5. On November 30, 2012, DSS denied Mulberry Street renewal of its agreement for the reasons listed below.

I. Failure to Allow Investigation

6. By letter dated May 18, 2012, DSS informed Mulberry Street that it would conduct a document review at Mulberry Street’s place of business on May 22, 2012.

7. On May 22, 2012, during DSS’s on-site document review at Mulberry Street’s place of business, Mack demanded DSS staff leave the premises. DSS staff complied with Mack’s demand and left immediately.

8. On June 27, 2012, DSS sent Mulberry Street a letter, via mail, requesting documents to complete the document review it began on May 22, 2012.

9. In July 2012, Mulberry Street submitted documents to DSS.

10. On September 11, 2012, DSS sent Mulberry Street another letter, via mail, requesting additional documents, based on deficiencies in the documents produced in July 2012.

11. Later in September 2012, Mulberry Street submitted documents to DSS. These documents were deficient for the following reasons:

- a. There was no documentation to support service was provided;
- b. There was insufficient documentation to support service was provided;

c. Time sheets and/or documentation did not support the units billed;

d. There was no documentation to support Individualized Supported Living direct care service was provided on date of service billed; and

e. There was no documentation to support 372.67 hours at \$19.00/hour provided for the month and no indication that this reduction in services was reported to and approved by the Kansas City Regional Office of the Centers for Medicare and Medicaid Services, an agency of the United States Department of Health and Human Services.⁸

II. Billing for Personal Assistant Services Provided by Legal Guardian

12. In conjunction with its contract to provide Title XIX Medicaid services, Mulberry Street also had a contract with the Missouri Department of Mental Health, Division of Development Disabilities (“DMH”) to provide services for individuals with developmental disabilities. Mulberry Street’s contract with DMH provides:

A family member approved to provide personal assistant services shall not also be the person’s legal representative (guardian).^[9]

13. Between September 1, 2009 and January 31, 2012, Mulberry Street submitted claims for personal assistant services provided to participant K.M. These personal assistant services were provided by Mack, K.M.’s mother and legal guardian, who was also Mulberry Street’s owner.

14. On June 16, 2010, DSS sent a letter (“recoupment letter”) to Mulberry Street, explaining that personal assistant services provided by a participant’s legal guardian were not to be billed. The letter further requested a recoupment of the amount billed and paid up to that date

⁸ These five deficiencies are taken from DSS’s letter of November 30, 2012, denying renewal of Mulberry Street’s agreement. While this letter lists other deficiencies, DSS merely lists these five in paragraph 16 of its “Statement of Uncontroverted Facts.” It is not our responsibility to decipher inconsistencies or a confusing presentation of facts by a party. We therefore find any resulting facts in favor of the non-moving party.

⁹ Respondent’s Exhibit G, p. 14.

for services Mack provided to K.M. According to the recoupment letter, the violations stem from section 13.31.A(2)(b) of the DMH Waiver Manual, which in turn is a cause for sanctions under 13 CSR 70-3.030(3)(A)⁷.¹⁰

15. After receiving the letter, Mulberry Street continued to bill for personal assistant services provided by Mack to K.M., as noted above, until January 31, 2012.

16. The aforementioned claims for services provided by Mack to K.M. totaled \$6,623.76. Mulberry Street has since repaid this amount to DSS after the two parties entered into a settlement agreement on April 10, 2013.

III. Alleged Improper Subcontracting

17. Paragraph 3.1.4, under “Medicaid Requirements,” of Mulberry Street’s contract with DMH provides:

[Mulberry Street] shall not subcontract for the provision of waived services unless [Mulberry Street] is designated by [DMH] as an Organized Health Care Delivery System (OHCDS) and is in compliance with 42 CFR, Part 434 and 45 CFR, Part 74.^[11]

18. Section 12.2.A of DMH’s Waiver Manual provides:

Medicaid regulations require that payment be made directly to the provider of service, or to the provider’s employer. An exception may be made for a special type of provider under the Waiver, known as an Organized Health Care Delivery System, or OHCDS.^[12]

19. Mulberry Street was never designated by DMH as an OHCDS.

¹⁰ However, section 13.31.A(2)(b) of the DMH Waiver Manual was not provided to us with the motion.

¹¹ Respondent’s Exhibit G.

¹² Respondent’s Exhibit I, p. 3.

20. Between October 18, 2011 and December 20, 2011, Mulberry Street subcontracted with Lori Story, an independent contractor, to provide occupational therapy services to participant C.A.

21. Mulberry Street submitted claims to DSS, and received payment, for the aforementioned subcontracted services provided by Lori Story to C.A.

Conclusions of Law

We have jurisdiction to hear this case.¹³ We have discretion to take any action the Department could have taken, and we need not exercise our discretion in the same way as the Department.¹⁴

DSS argues there is cause to deny renewal of Mulberry Street's agreement under 13 CSR 70-3.020(3)(A), (J), (K), (L) and 13 CSR 70-3.030(3)(A)4, 6, 7, 17, 26, 37, which provide:

13 CSR 70-3.020 Title XIX Provider Enrollment

* * *

(3) The single state agency, at its discretion, may deny or limit an applying provider's enrollment and participation in the [DSS] program for any one (1) of the following reasons:

(A) A false representation or omission of any material fact or information required or requested by the single state agency pursuant to an applying provider making application to enroll. This shall include material facts or omissions about previous Medicaid participation in Missouri or any other state of the United States;

* * *

(J) Any previous failure to correct deficiencies in provider operation after receiving written notice of the deficiencies from the single state agency;

¹³ Section 208.156.3, RSMo 2000.

¹⁴ *Dep't of Soc. Services v. Mellas*, 220 S.W.3d 778, 782-783 (Mo. App. W.D. 2007).

(K) Any previous violation of any regulation or statute relating to the applying provider's participation in the [DSS] program;

(L) Failure to supply further information to the single state agency after receiving a written request for further information pursuant to a provider enrollment application or application for provider direct deposit[.]

13 CSR 70-3.030 Sanctions for False or Fraudulent Claims for [DSS] Services

* * *

(3) Program Violations.

(A) Sanctions may be imposed by the [DSS] agency against a provider for any one (1) or more of the following reasons:

* * *

4. Failing to make available, and disclosing to the [DSS] agency or its authorized agents, all records relating to services provided to [DSS] participants or records relating to [DSS] payments, whether or not the records are commingled with non-Title XIX (Medicaid) records. All records must be kept a minimum of five (5) years from the date of service unless a more specific provider regulation applies. The minimum five (5)-year retention of records requirement continues to apply in the event of a change of ownership or discontinuing enrollment in [DSS]. Services billed to the [DSS] agency that are not adequately documented in the patient's medical records or for which there is no record that services were performed shall be considered a violation of this section. Copies of records must be provided upon request of the [DSS] agency or its authorized agents, regardless of the media in which they are kept. Failure to make these records available on a timely basis at the same site at which the services were rendered or at the provider's address of record with the [DSS] agency, or failure to provide copies as requested, or failure to keep and make available adequate records which adequately document the services and payments shall constitute a violation of this section and shall be a reason for sanction. Failure to send records, which have been requested via mail, within the specified time frame shall constitute a violation of this section and shall be a reason for sanction;

* * *

6. Engaging in conduct or performing an act deemed improper or abusive of the [DSS] program or continuing the conduct following notification that the conduct should cease. This will include inappropriate or improper actions relating to the management of participants' personal funds or other funds;

7. Breaching of the terms of the [DSS] provider agreement of any current written and published policies and procedures of the [DSS] program (Such policies and procedures are contained in provider manuals or bulletins which are incorporated by reference and made a part of this rule as published by the Department of Social Services, [DSS] Division, 615 Howerton Court, Jefferson City, MO 65109, at its website www.dss.mo.gov/mhd, September 15, 2009. This rule does not incorporate any subsequent amendments or additions.) or failing to comply with the terms of the provider certification on the [DSS] claim form;

* * *

17. Failing to correct deficiencies in provider operations within ten (10) days or date specified after receiving written notice of these deficiencies from the single state agency or within the time frame provided from any other agency having licensing or certification authority;

* * *

26. Submitting claims for services not personally rendered by the individually enrolled provider, except for the provisions specified in the [DSS] dental, physician, or nurse midwife programs where such claims may be submitted only if the individually enrolled provider directly supervised the person who actually performed the service and the person was employed by the enrolled provider at the time the service was rendered. All claims for psychiatric, psychological counseling, speech therapy, physical therapy, and occupational therapy services may only be billed by the individually enrolled provider who actually performs the service, as supervision is noncovered for these services. Services performed by a nonenrolled person due to [DSS] sanction, whether or not the person was under supervision of the enrolled provider, is a noncovered service;

* * *

37. Failure to comply with the provisions of the Missouri Department of Social Services, [DSS] Division Title XIX Participation Agreement with the provider relating to health care services[.]

I. Failure to Allow Investigation

DSS alleges there is cause to deny Mulberry Street's application for its failure to allow the on-site audit of May 18, 2012 and for failing to provide proper documentation under 13 CSR 70-3.020(3)(A); 13 CSR 70-3.020(3)(K) and 13 CSR 70-3.030(3)(A)4; and 13 CSR 70-3.020(3)(L).

Regulation 13 CSR 70-3.030(3)(A)4 provides that the failure to make available and disclose all records relating to services provided to DSS participants is a program violation. Mulberry Street failed to make available its records during DSS's on-site document review of May 22, 2012. Subsequently, Mulberry Street failed to disclose all records relating to services it provided to DSS participants in the documents it sent DSS in July 2012 and September 2012. Thus, Mulberry Street was in violation of 13 CSR 70-030(3)(A)4. Regulation 13 CSR 70-3.020(3)(K) provides for denial of an application for any previous violation of regulations or statutes in the applicant's previous participation in a DSS program. Thus, Mulberry Street's violation of 13 CSR 70-030(3)(A)4 constitutes cause for denial of its application under 13 CSR 70-3.020(3)(K).

Regulation 13 CSR 70-3.020(3)(A) provides cause for denying the application for renewal of Mulberry Street's agreement for false representation or omission of any material fact. False is defined as:

1 b: intentionally untrue : LYING[.][¹⁵]

While Mulberry Street refused to permit DSS staff to complete its on-site document review, and

¹⁵ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 819 (unabr. 1986).

provided incomplete information on subsequent documents it sent to DSS, there is no evidence that it intentionally did so to deceive DSS. Therefore, we do not find that Mulberry Street made a false representation. Omission is defined as:

1 a: apathy toward or neglect of duty : lack of action[.][¹⁶]

Mulberry Street did neglect its duty when it failed to provide proper documentation in response to two separate requests by DSS. Consequently, we find there was cause to deny Mulberry Street's application under 13 CSR 70-3.020(3)(A).

Regulation 13 CSR 70-3.020(3)(L) provides that failure to supply further information to DSS after receiving a written request for further information is cause for denial of Mulberry Street's application. Mulberry Street failed to provide proper and adequate documentation in response to DSS's written requests of June 27, 2012 and September 11, 2012. However, the fact that it did provide some documentation indicates that it did not fail to supply further information when requested. We therefore do not find cause to deny Mulberry Street's application under 13 CSR 70-3.020(3)(L).

Mulberry Street's failure to allow DSS to conduct an on-site audit on May 22, 2012 and its subsequent failures to provide adequate documentation to DSS's written requests constitute causes to deny DSS's application under 13 CSR 70-3.020(3)(A) and 13 CSR 70-3.020(3)(K).

II. Billing for Personal Assistant Services Provided by Legal Guardian

DSS alleges that there is cause to deny Mulberry Street's application for its billing of personal assistant services provided to K.M. by Mack, K.M.'s mother and legal guardian, under 13 CSR 70-3.020(3)(J); 13 CSR 70-3.030(3)(A)6, 7, 17, and 37.

¹⁶ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1574 (unabr. 1986).

Regulation 13 CSR 70-3.030(3)(A)6 provides that engaging in conduct or performing an act deemed improper or abusive of the DSS program or continuing the conduct following notification is a program violation. Mulberry Street was informed, by letter dated June 16, 2010, that it should not bill for personal assistant services provided to K.M. by Mack. Despite being notified, Mulberry Street continued to bill for personal assistant services provided to the participant by the participant's legal guardian. DSS claims this is a program violation under 13 CSR 70-3.030(3)(A)6. However, while it is true that Mulberry Street's billing practices violated its contract with DMH, DSS fails to provide a regulation or statute that provides Mulberry Street's actions to be a program violation under its agreement with DSS. Even in the subsequent settlement agreement, which was provided as an exhibit to DSS's motion, there was a failure to cite legal authority that would allow DSS, rather than DMH, to take action against Mulberry Street for this billing. In the event such statutes or regulations exist, we are not responsible for providing DSS with its legal research. Accordingly, we do not find that Mulberry Street committed a program violation under 13 CSR 70-3.030(3)(A)6.

Regulation 13 CSR 70-3.030(3)(A)7 provides that breaching the terms of a provider agreement with DSS is a program violation. DSS further alleges that, because the provider agreement required Mulberry Street to adhere to regulations enforced by DMS, its violation of 13 CSR 70-3.030(3)(A)6 was a violation of its agreement. This, in turn, is a violation of 13 CSR 70-3.030(3)(A)7. Since we did not find a program violation under 13 CSR 70-3.030(3)(A)6, we do not find Mulberry Street's billing for personal assistant services provided to K.M. by Mack to be a violation of 13 CSR 70-3.030(3)(A)7.

Regulation 13 CSR 70-3.030(3)(A)17 provides that failure to correct deficiencies within ten days after receiving notice of these deficiencies is a program violation. However, simply

stating that there are deficiencies, without citing legal authority, is insufficient. Thus, we do not find that Mulberry Street committed a program violation under 13 CSR 70-3.030(3)(A)17.

Regulation 13 CSR 70-3.030(3)(A)37 provides that failure to comply with the provisions of the DSS participation agreement constitutes a program violation. DSS argues:

[Mulberry Street]’s failure to follow the rules set forth in its DMH contract also resulted in violation of 13 CSR 70-3.030(3)(A)(37).
(sic)[¹⁷]

Regulation 13 CSR 70-3.030(3)(A)37 refers to participation agreements with DSS, not contracts with DMH. While DSS claims that Mulberry Street’s agreement required it to adhere to the terms of its DMH contract, we failed to find such provision in the participation agreements, and DSS failed to accurately point us to where such provision exists. Furthermore, if this was simply a typographical error meant to refer to Mulberry Street’s agreement, it is not our responsibility to amend typographical errors in DSS’s legal memorandum in its favor. Accordingly, we disagree with DSS that Mulberry Street’s failure to follow its contract with DMH was a program violation under 13 CSR 70-3.030(3)(A)37.

Likewise, because DSS failed to cite supporting authority, we also cannot find that there is cause to deny Mulberry Street’s application for its failure to correct deficiencies under 13 CSR 70-3.020(3)(J).

III. Alleged Improper Subcontracting

DSS alleges that there is cause to deny Mulberry Street’s application for its subcontracting of occupational therapy services under 13 CSR 70-3.030(3)(A)7, 26, and 37.

DSS fails in its argument for two reasons. First, it fails to cite supporting authority that provides for a program violation when the actual violation is that of paragraph 3.1.4 of Mulberry

¹⁷ Legal Memorandum in Support of Respondent’s Motion for Summary Decision, p. 7.

Street's contract with DMH and a violation of § 12.2.A of the DMH Waiver Manual. In fact, DSS incorrectly refers to the DMH Waiver Manual as the MO HealthNet provider manual in its legal memorandum.¹⁸

Second, both the DMH contract and the DMH Waiver Manual prohibit the subcontracting of waived services. Here, the service that was subcontracted was occupational therapy. DSS failed to provide evidence that occupational therapy was a waived service at the time of the allegations.

Accordingly, we do not find program violations under 13 CSR 70-3.030(3)(A)7, 26, and 37 for Mulberry Street's subcontracting of occupational therapy.

IV. Discretion

As stated above, this appeal vests in this Commission the same degree of discretion as DSS and we need not exercise it in the same way. DSS was clearly unable to provide supporting authority or enough relevant facts to support two of its three counts. However, the evidence shows that Mulberry's Street's actions in denying DSS staff to conduct an audit were willful. We cannot take this conduct lightly. Therefore, we uphold DSS's denial of Mulberry Street's application for renewal.

Summary

We deny Mulberry Street's application for renewal of a Title XIX Medicaid participation agreement under 13 CSR 70-3.020(3)(A) and 13 CSR 70-3.020(3)(K).

SO ORDERED on March 26, 2014.

/s/ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner

¹⁸ Legal Memorandum in Support of Respondent's Motion for Summary Decision, p. 8.